

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

COMMISSIONER OF INSURANCE
FOR THE STATE OF MICHIGAN,

Petitioner,

v.

File NO: 98-88265-CR
Hon. James R. Giddings
AG.No: 1998043333A

MICHIGAN HEALTH MAINTENANCE
ORGANIZATION PLANS, INC., a Michigan
Health maintenance organization, doing business
As OmniCare Health Plan,

Respondent.

MARK J. ZAUSMER (P31721)
AMY M. SITNER (P46900)
ZAUSMER, KAUFMAN, AUGUST & CALDWELL, P.C.
Attorneys for Petitioner
31700 Middlebelt Road, Ste. 150
Farmington Hills, MI 48334
(248) 851-4111

GILBERT M. FRIMET (P13735)
ALAN ROGALSKI (P44550)
FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Creditor, Home Respiratory Care and Hospital Equipment, Inc.
32300 Northwestern Hwy., Ste. 230
Farmington Hills, MI 48334
(248) 539-9900

**BRIEF OF CREDITOR, HOME RESPIRATORY CARE AND HOSPITAL EQUIPMENT, INC.,
CONCERNING ISSUE OF PRIORITY OF PROVIDER CLAIMS**

Creditor, Home Respiratory Care and Hospital Equipment, Inc., by its attorneys, Alan T. Rogalski and Gilbert M. Frimet of FOSTER, SWIFT, COLLINS & SMITH, P.C. submit this Brief concerning their Priority as a Class 2 Creditor.

Home Respiratory Care and Hospital Equipment, Inc. ("Home Respiratory Care") has been a participating health care provider with OmniCare Health Plans for at least 10 years and has rendered respiratory therapy services, clinical assessments, diagnostic testing and durable medical equipment through licensed respiratory therapists and bio-technicians. Home Respiratory Care is a small, family-owned business, which has in excess of \$42,329.41 in unpaid claims for services and supplies which were provided to OmniCare Health Plan members prior to October 1, 2004. These unpaid claims are entitled to Class 2 priority pursuant to MCL §500.8142(1)(b). Pursuant to this Court's May 12, 2005 Corrected and Amended Order Setting Briefing Schedule and Establishing Notice Procedure with Respect to the Issue of the Priority of Provider Claims, interested parties were invited to present arguments on the issue of how claims in OmniCare Health Plans' liquidation should be classed and paid under Chapter 81 of the Michigan Insurance Code. MCL §500.8142 establishes the priority of the distribution of claims from an insurer's estate and provides as follows:

- (1) Except as provided in subsection (2), the priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section. Every claim in each class shall be paid in full or adequate funds retained for their payment before the members of the next class receive payment. Subclasses shall not be established with any class. The order of distribution of claims is as follows:
 - a. **Class 1.** The costs and expenses of administration....
 - b. **Class 2.** Except as otherwise provided in this section, all claims under policies for losses incurred, including third party claims, and all claims of a guarantee association or foreign guarantee association. However, obligations of an insolvent insurer arising out of reinsurance contracts shall not be included in this class. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment value shall be treatment as loss claims. For purposes of this section, life insurance and annuity policies include, but are not limited to, individual annuities, group annuities, guaranteed investment contracts, and funding agreement contracts, issued by

an insurer. That portion or any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligation of support or by way of succession at death or as proceeds of life insurance, or as gratuities. A payment by an employer to his or her employee shall not be treated as a guarantee.

- c. Class 3. Claims of the Federal Government.
- d. Class 4. All claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property that are not under policies and, to the extent not included in Class 1, debts due to employees for services performed to the extent that they do not exceed \$1,000.00 and represent payment for services performed within one (1) year before the filing of the Petition for Liquidation. Officers and directors are not entitled to the benefit of the priority for debts due to employees for services performed. The priority for debts due to employees for services performed is in lieu of any other similar priority authorized by law as to wages or compensation of employees.
- e. Class 5. Claims under non-accessible policies for unearned premium or other premium refunds and claims of general creditors....

MCL §500.8142 (emphasis added).

Home Respiratory Care's claims, just like the claims of physicians, other health professionals, and health care providers should be classified and paid as Class 2 claims under MCL §500.8142(1)(b). Health maintenance organizations are obligated by statute to furnish their enrollees with designated health services. Unlike indemnity insurers, health maintenance organizations do not pay claims to an enrollee. Rather, "losses incurred" by a health maintenance organization are the amounts payable to health care providers like Home Respiratory Care, physicians and other health care professionals.

The operative provisions of Section 8142 of the statute concerning the priority of creditors' claims, provides that **ALL** claims under policies for losses incurred, including third party claims, are to be treated as Class 2 claims. Just like every other health care provider, Home Respiratory

Care's claims for professional services and durable medical equipment are for professional services rendered by licensed health care providers and for durable medical equipment supplied and they are third-party claims for losses incurred against which OmniCare health plan insured. Like every other health care provider, Home Respiratory Care incurred losses as a third-party under contract with OmniCare Health Plan. Like every other health care provider that participated with OmniCare Health Plan, Home Respiratory Care was paid directly by OmniCare Health Plan and was prohibited from seeking payment from OmniCare's members. Like every other health care provider under a Participation Agreement with OmniCare Health Plan, Home Respiratory Care was ordered by the court to maintain a participation contract with OmniCare Health Plan. Like every other health care provider under contract with OmniCare Health Plan, Home Respiratory Care incurred losses by being required to purchase and maintain inventories of durable medical equipment that were required to be available on a moment's notice on an emergency basis. Like many other health care providers, Home Respiratory Care provided health care services and durable medical equipment to OmniCare's members, even though its claims were not paid.

The legislature requires that the court apply a reasonable interpretation that best accomplishes the legislative purposes. *Rowell v Security Steel Processing Co*, 445 Mich 347, 354, 518 NW2d 409 (1994). Under MCL 500.8101(2), the legislative intent requires that the statute's provisions must be liberally construed in favor of creditors. See also, *Yetzke v Fausak*, 194 Mich App 414, 421, 488 NW2d 222, *app den* 441 Mich 889, 495 NW2d 383 (1992). In addition, the statute should be construed in the most beneficial way to prevent absurdity, hardship, or injustice. *Yetzke, supra* at 421. Recognition of Home Respiratory Care as a Class 2 creditor would be consistent with the legislative intent and would be fair and reasonable.

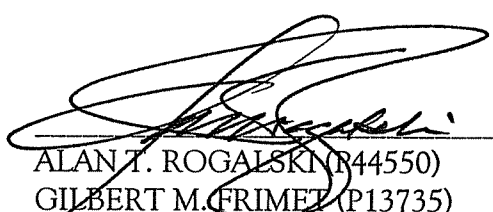
For these reasons, as well as to achieve the equitable objectives of Chapter 81 of the Insurance Code, the Court is requested to conclude that, according to MCL §500.8142(1)(b), "*all claims under policies for losses incurred, including third party claims,*" Home Respiratory Care is a Class 2 provider, just like the claims of physicians and other health care providers.

RELIEF REQUESTED

Home Respiratory Care and Hospital Equipment, Inc. respectfully requests that the court order that all amounts payable under Home Respiratory Care's Provider Agreement with OmniCare Health Plan, be classified and paid as Class 2 claims under MCL §500.8142(1)(b).

Respectfully submitted:

FOSTER, SWIFT, COLLINS & SMITH, P.C.


ALAN T. ROGALSKI (R44550)
GILBERT M. FRIMET (P13735)
Attorneys for Creditor

Dated: June 20, 2005